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July 17, 2013

VIA ELECTRONIC FILING

The Hon. Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Re: *Certain Products Containing Interactive Program Guide and Parental Control Technology*, ITC Inv. No. 337-TA-845

Dear Secretary Barton:

Enclosed for filing please find the attached *Respondent Netflix's Public Interest Statement* in connection with the above-referenced investigation.

Sincerely,

/s/ Margaret D. Macdonald

Margaret D. Macdonald

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN PRODUCTS CONTAINING INTERACTIVE PROGRAM GUIDE AND PARENTAL CONTROL TECHNOLOGY**	**Investigation No. 337-TA-845**

RESPONDENT NETFLIX'S PUBLIC INTEREST STATEMENT

Pursuant to Commission Rule 210.50(a)(4), Respondent Netflix, Inc. ("Netflix") submits this Public Interest Statement. First and foremost, Netflix submits that the ALJ's June 7, 2013 Final Initial Determination ("ID") correctly found that Netflix did not violate section 337. Even were the Commission to reverse this determination, Netflix requests that the Commission adopt the ALJ's recommendation that no remedy be ordered, because it is undisputed that Netflix is a domestic company that does not import anything into the United States. *See* Recommended Determination on Remedy and Bond ("RD") at 4-5, 10.

However, in the event that the Commission finds a violation of section 337 and that a remedy is within its statutory mandate, Netflix respectfully requests that the Commission consider the following comments regarding the public interest.

I. THE PUBLIC INTEREST IS NOT SERVED BY ORDERING A REMEDY DIRECTED AT NETFLIX BECAUSE THIS IS A FUNDAMENTALLY DOMESTIC DISPUTE THAT DOES NOT BELONG IN THE ITC.

The remedy Complainants Rovi Corporation; Rovi Guides, Inc.; Starsight Telecast, Inc.; and United Video Properties, Inc. (collectively "Rovi") seek is novel, untested and discretionary. This Investigation, meanwhile, has only an attenuated connection to the Commission's mission and jurisdiction. The Commission should not exercise its discretion by awarding the unusual remedy Rovi seeks in this Investigation.

Of the ten Respondents initially named in this Investigation, Netflix alone *imports nothing.* This is uncontested. Netflix is a U.S. based company that provides video streaming services over the Internet. Rovi reads all or almost all of the limitations of the asserted patent claims on Netflix's *domestic* servers. Moreover, Rovi settled with all but one of the other Respondents, and does not contest the ALJ's finding that the other Respondent, Roku, Inc. ("Roku"), does not violate section 337. Thus, no exclusion order is possible in this case, because there no longer are any Respondents that import anything that Rovi claims violates section 337.

As a result, this now is an Investigation with *no* imported product, and *no* potential exclusion order, placing it far out of the center of the Commission's jurisdiction and purpose. Indeed, as Netflix has argued in its response to Rovi's petition for review, on these facts no remedy is possible at all. *See* Netflix's Resp. to Pet. for Review at 4-9, EDIS Dkt. No. 512583 (July 2, 2013) ("Resp. Br.").

But even if the Commission disagrees, and concludes that a remedy is *possible*, that does not mean one is *appropriate.* The only remedy Rovi seeks with respect to Netflix would be a first-of-its kind stand-alone cease-and-desist order ("CDO"). *See* Compls. Pet. for Rev. of Final ID at 5 n.3, EDIS Dkt. 512973, (June 24, 2013) ("Compl. Br."). What would make this remedy remarkable is that it is not "in lieu of" an exclusion order (19 U.S.C. § 1337(f)), because there is no dispute that Netflix does not import anything, and thus there is nothing to exclude Netflix from importing.[1]

[1] Indeed, no exclusion order directed at other Respondents is even possible. Rovi has settled with all but one of the other Respondents, and thus no exclusion order can be directed at them. And Rovi does not contest that Roku does not import anything in violation of section 337, and thus no exclusion order can be directed at Roku.

Even if the Commission concludes that this novel CDO is within its authority—and Netflix submits that it is not—this Investigation, where Rovi targets Netflix's *domestic server* activity, is not one in which such a CDO should issue as a matter of policy. The Commission's authority to grant CDOs is expressly framed in permissive terms. *Compare* 19 U.S.C. § 1337(f)(1) ("the Commission may issue" a CDO) *with id.* § 1337(d)(1) (subject to consideration of the public interest, "[i]f the Commission determines . . . that there is a violation of this section, it shall direct that the articles concerned . . . be excluded from entry"); *see also* RD at 4, 10; Resp. Br at 4-8. The Commission has recently taken steps to terminate more expeditiously investigations that fall outside its mandate—including those that fail the importation requirement or domestic industry requirement. *See* "Pilot Program Will Test Early Disposition of Certain Section 337 Investigations," U.S. International Trade Commission.[2] To grant a discretionary remedy for the first time in an Investigation that has such a weak connection to the Commission's core mission would undermine those recent steps, and thus would not serve the public interest.

This is all the more true because Rovi has other, more suitable, avenues for relief. If it is determined that Rovi is in fact asserting valid patents and that Netflix infringes those patents, Rovi can enforce its intellectual property rights in the Northern District of California, where a suit between the parties is pending. Denying Rovi a novel remedy here thus has no adverse effect on the public interest.

[2] http://www.usitc.gov/press_room/documents/featured_news/337pilot_article.htm.

II. THE NOVEL REMEDY ROVI SEEKS WOULD ENCOURAGE ENTITIES THAT DO NOT DRIVE TRADE OR PROMOTE INNOVATION TO FILE COMPLAINTS WITH THE COMMISSION, WHICH IS CONTRARY TO THE PUBLIC INTEREST.

Awarding the remedy Rovi seeks here would encourage increased filings in the Commission, especially by Patent Assertion Entities ("PAEs") that seek to avoid the consequences of the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C*, 547 U.S. 388 (2006). Given the problems caused by patent litigation filed by PAEs, it appears that these cases negatively impact the competitive conditions in the United States. Thus, the public interest is not served by unnecessarily encouraging PAEs to increase their activity before the Commission.

While Rovi offers some products, it is largely driven by licensing revenue from its patent portfolio. *See, e.g*, Rovi Corp. Results of Operations and Financial Conditions, SEC Form 8-K (Jan. 8, 2013); ID at 301. Rovi has spent a decade building a patent portfolio by acquiring companies or buying already filed patents—many of which date to the 1990s when technology was fundamentally different. The result is a portfolio of 1,100 patents and patent applications related to interactive program guides. Rovi has leveraged its huge portfolio to extract license agreements from many high-tech companies throughout the United States.

The Commission has identified two types of licensing activity relevant to establishing a domestic industry. *See* Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same ("Multimedia Display and Navigation Devices"), Inv. No. 337-TA-694, USITC Pub. 4292, 2011 ITC LEXIS 2812 at *45, Comm'n Op., at 15 (Nov. 2011). The first is production-driven licensing, which encourages the adoption and use of the patented technology to create new products and industries. *Id.* The second is revenue-driven licensing, which takes advantage of the patent right to derive revenue by

targeting existing production. *Id.* While both kinds of licensing are relevant to section 337's domestic industry inquiry, revenue-driven licensing is given less weight because it does little to drive trade or promote innovation. *See id.* at *45 n.20. Instead, revenue-driven licensing simply extracts money from companies that are already driving trade and innovation. Rovi practices revenue-driven licensing. *See* ID at 301.

Revenue-driven licensing is also the model used by PAEs to stifle innovation while thriving themselves. *See* "FACT SHEET: White House Task Force on High-Tech Patent Issues," the White House (June 4, 2013).[3] Since *eBay,* PAEs face increased challenges to obtaining injunctive relief in the district courts. Granting the remedy Rovi seeks would invite increasing numbers of PAEs to circumvent the *eBay* standard, even as to wholly domestic activity, by instead seeking CDOs from the Commission based on novel theories such as the one being pursued by Rovi here. More investigations by PAEs would hinder rather than promote trade. *See id*. The remedy Rovi seeks is therefore contrary to the public interest.

Dated: July 17, 2013

Respectfully submitted,

By: */s/ Michael Kwun*

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[3] *See* http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues.

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CERTIFICATE OF SERVICE

I, Yu-Ing Huang, hereby certify that on this 17th day of July, 2013 copies of foregoing document were filed and served upon the following parties as indicated:

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